

# The future of the legal profession

(presented at SA Legal Convention July 2002)

## The New World Order

No one would deny that the world has changed immensely in the past twenty years. Amongst the major global developments have been:

- **The internationalisation of business.** Global businesses search for the cheapest source of labour, wherever it may be situated. Clothes are made in Vietnam and China. Accounting and call centre services are outsourced to India. The rise of global business has included accounting and consulting firms, and more recently, law firms. The consulting firms in particular have a vast ability to draw on experience gained from previous assignments, wherever in the world those assignments were undertaken. Their strategic assets such as brand name, capital, technology and research and development capabilities eclipse those of most law firms.<sup>1</sup> Global accounting firms have evinced an intention to be leaders in the legal market within five years.<sup>2</sup>
- **The communication revolution.** Fax machines, mobile phones and the Internet have put increasing pressure on service providers (including lawyers) to give speedier service. Furthermore, physical proximity is no longer essential for doing business. For example, if an investor decides to sell shares it is no longer necessary to engage a local broker; the whole transaction can be done electronically, and the investor's choice of provider is likely to be driven by price. The Internet increases buyer power by facilitating a customer's comparison of services offered and prices charged by different providers.
- **A relentless demand by shareholders for higher profits.** This pressure has reduced the average tenure of CEO's and turned their focus towards cost-cutting measures. This means that all expenses are closely scrutinised, and legal fees are no exception. Global businesses have enormous buyer power. They are tending to segment their legal service purchases into two broad categories: commodity work and value-added services. For commodity work such as insurance defence, they are engaging local firms to provide satisfactory services at minimum cost. However, for value-added services such as mergers and acquisitions and capital markets transitions, they want "the best", and will pay a premium, to engage a global firm.<sup>3</sup>
- **A new view of work.** Younger people (the so-called Generation X) are renowned for being loyal to their careers rather than to their employers, perhaps as a response to the endless rounds of downsizing we have seen in recent times. They see each new position as a way of acquiring experience to equip them for their next "gig". They also value flexibility, lifestyle and leisure time. If Generation X

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<sup>1</sup> Norman K. Clark, *Seven Survival Skills for the MDP Market* Altman Weil Report to Legal Management February 2000

<sup>2</sup> Susskind, *Transforming the Law* 2000 Oxford University Press, pp.60-61

<sup>3</sup> Becker, Herman, Samuelson and Webb, *Lawyers get down to Business* The McKinsey Quarterly 2001 No.2. p. 47

lawyers resist capital partnership we may see a crisis of capital in firms as fewer people are prepared to put their houses on the line in order to earn a living.

In Australia, we have seen:

- **The floating of the Australian dollar.** Our currency's fortunes now fluctuate according to world events. Deregulation has revealed very starkly Australia's real place in the financial world.
- **The movement of head offices to the eastern seaboard.** Much of the high-level strategic and development work is now done in Melbourne and even more in Sydney. This has led to a trend for young people including lawyers to move to Melbourne and Sydney to seek a better quality of work and higher salaries.
- **The ageing of the population.** The number of young adults is sure to shrink in the next 10 years, whereas the number of elderly is rising. The table on the next page shows the changes in the South Australian population by age over the past forty years. The drop in the numbers of people under twenty years of age (approaching 1961 levels) shows a reduced pool of people available to train as lawyers over the next ten years, which is likely to be exacerbated by the "brain drain". The number of lawyers over 40 years of age will probably be much larger in ten years' time. However, in the general community people have been retiring earlier, or have been made redundant in their forties or fifties. This has meant that older (middle-aged?) lawyers have lost their referral networks, which has diminished their ability to bring in work.
- **The introduction of the Goods and Services Tax.** The GST has increased the price of services to the ultimate consumer. Whereas business buyers can claim an input credit for the GST, personal consumers cannot claim any relief. The result has been a net increase in legal fees to clients in areas such as Family, Personal Injury, Criminal and Estate practice. Some small firms have felt pressure to discount their fees to cushion the impact of the GST.
- **A crisis in the availability and cost of insurance.** We are about to see a round of "tort reform" to limit or eliminate rights to sue and to cap damages. Only a dozen years ago substantial limitations were imposed in relation to motor vehicle accident claims in South Australia, which made that field of work less profitable for lawyers. The new round of tort reform is likely to affect the smaller firms.

### Population of South Australia by age, 1961 – 2001

(source: Australian Bureau of Statistics)

Age range	1961	1981	2001
0-4	102,993	91,009	89,529
5-9	99,436	102,966	98,299
10-14	99,003	112,602	99,350
15-19	74,541	113,946	101,047
20-24	60,417	110,478	90,895
25-29	56,452	103,613	94,318
30-34	67,219	103,683	104,332
35-39	72,475	83,206	109,556
40-44	63,975	70,193	112,652
45-49	61,646	63,491	104,518
50-54	50,881	69,929	101,153
55-59	40,791	68,698	78,307
60-64	34,645	56,330	63,593
65-69	30,916	49,635	54,754
70-74	25,107	36,839	54,489
75-79	28,843*	23,930	46,591
80-84	N/A	14,337	30,541
85-89	N/A	7198	16944
90-94	N/A	2373	6272
95-99	N/A	534	1516
100 and over	N/A	43	256

\* people aged 75 and over.

Developments within the Australian legal profession include:

- **The lifting of the prohibition on advertising.** This has led to an increased level of marketing activity, which has improved the ability of clients to compare providers, their services and their prices. Yet only twenty years ago, approaching a client of a rival firm, handing out business cards at a function or even putting a large sign outside the office were frowned upon as touting.
- **Increased competitive tendering activity.** Twenty years ago it was unprofessional to respond to any competitive tender. Today, one Internet legal tendering centre promises “the best legal talent in the world at the best price – anywhere in the world”.<sup>4</sup> Clients using a tender process often demand fixed fees for commodity work, faster service and “value-adds” (extra services for free). Some Government tenders even demand that certain levels of pro bono work be undertaken.

<sup>4</sup> elawforum.com

- **A squeeze on legal aid funding.** This has made it much harder to earn a living from legal aid assignments. More firms now decline to undertake legally funded cases, leaving that work to the less experienced lawyers practising on their own account. Because the legal profession is predominantly a private, for-profit profession, disadvantaged people find it difficult to gain access to legal representation. We have no legal equivalent of public hospitals. If the real test of a legal system is “the degree to which the poor and socially disadvantaged are protected from injustice”<sup>5</sup>, ours must be found wanting.
- **A shift towards business law.** Whereas twenty years it was common for large firms to provide a full range of services, they have increasingly shed personal services law in favour of business law, where they can charge higher fees. Smaller, “boutique” business law firms have also emerged. Salaries for business law as opposed to personal services law are becoming polarised. . It seems that fewer lawyers now want to be personal services lawyers, and even fewer want to practise in the country. This is unfortunate, as our society needs good personal services and country lawyers. Yet, whilst law firms have been scrambling for a slice of the business law pie, the level of big business in South Australia has dramatically decreased, leaving small to medium sized businesses which are less able to afford high fees
- **Lawyers increasingly expected to share the risk with their clients.** More clients are insisting on full or partial success fees, or offering remuneration in the form of equity. This has shifted the emphasis away from billing on hourly rates, towards a share of the value generated by the lawyer for the client. This way of working is fairly new for lawyers, but has long been a way of life for consulting firms. A recent survey of consultants found that one third of their large clients insist on performance-based or results-based fees.<sup>6</sup>
- **Increased career mobility.** Whereas twenty years ago it was unusual and quite difficult for South Australian lawyers to move overseas or even interstate to work, the introduction of the Mutual Recognition Act has made it easy for lawyers to relocate. Young lawyers have been lured interstate and overseas by high demand and attractive salaries. When those people return, they will have high skill levels but no client base, and therefore the current expectation that senior people should bring clients with them may become unrealistic. The Mutual Recognition Scheme has also enabled interstate barristers to appear in our Courts, and interstate law firms have opened branch offices here in competition with the local profession. Of course, some local firms have retaliated by opening their own interstate offices.

### **The half way house**

The South Australian legal profession has reached a half-way house. The old protections have been dismantled, and law firms have to be run as businesses in order to survive. But there are significant barriers which prevent law firms from competing as businesses:

- **The benefits of incorporation are not available to lawyers.** A legal practice may only be structured as a partnership, sole trader or legal practice company.

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<sup>5</sup> Kourakis, *Challenging Year Ahead* Law Society Bulletin November 2001, pp 6-7

<sup>6</sup> *AFR Consulting Survey 2002*, reported in *AFR Boss* July 2002 pp.35-39

This means that lawyers cannot limit their liability and can only manage business risks through insurance and being careful. The structural limitations also create difficulties for community legal services.

- **Lawyers cannot share profits with other professionals.** They may only cooperate through referring clients, which limits the services they can offer.
- **A law firm cannot operate another business under the same banner.** This denies lawyers the opportunity of gaining a competitive advantage through this method of differentiation.
- **Law firms cannot raise capital from the public.**

### **The future of the legal profession**

I believe that the future of the legal profession lies in:

1. Embracing the concept of multi-disciplinary practice
2. Developing new and innovative services
3. Recognising alternative types of “successful lawyer”.

#### **1. Embracing the concept of multi-disciplinary practice**

The Law Council’s *Policy on Multidisciplinary Practice* states<sup>7</sup>:

*The regulation of business structures should no longer be regarded as critical or necessary to the maintenance of professional standards.*

There is no requirement in the Policy that lawyers form the majority in a multidisciplinary practice (“MDP”). The proposal to allow incorporation under the Corporations Law simply proposes that at least one director must hold a practising certificate. Any lawyer practising in an MDP would be subject to the same professional obligations as a lawyer in a traditional law firm. This implies that legal services may be provided by entities other than traditional law firms, so that in effect, other professionals such as accountants may “practise law”, subject to a core area of reserved legal work.

Therefore, an MDP could take one of at least four forms:

1. a law firm adds non-law services by bringing in a non-lawyer partner
2. a law firm adds non-law services, which are provided either by the lawyers or by employed non-lawyers.
3. a non-law firm adds law services by bringing in a lawyer partner
4. a non-law firm adds law services by employing lawyers.

Joint venture arrangements may present further possibilities.

#### **What are the potential benefits of an MDP?**

- An MDP can package services innovatively, by bundling legal advice with other services. It has greater scope than a traditional law firm to serve clients’ needs.
- It enables lawyers to provide a seamless service, in a way which is not possible using a network of independent professionals
- It provides a new way of differentiating the firm, as the non-law services can be promoted in tandem with the traditional services. This could be a particular

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<sup>7</sup> Law Council of Australia, Policy Statement on Lawyers’ Business Structures, cl.4 (b).

advantage for a smaller firm, which may be able to serve an industry sector by packaging law and non-law services in unique combinations.

- It saves on the administrative costs of running two or more separate businesses.

Many accountants have added financial planning, strategic and business planning, change management and marketing to their traditional menu of services. As a result they can now charge a substantial monthly retainer to look after the client's business, rather than just a fee for service when the client presents with a specific problem.

Providing a broader range of services allows you to remain in contact with the client on a continuing basis, rather than serving them on a single occasion. Before a client decides to see a lawyer he or she must first identify a legal problem. Paradoxically, identifying a legal problem often requires some legal knowledge<sup>8</sup>, so clients miss many legal problems. The more contact you have with a client, and the more deeply you understand the client's business, the more likely you are to pick up legal issues that need to be addressed. Bundling legal services with business services gives a different perspective on a client's legal needs, and helps the lawyer to anticipate those needs.

It is likely that people will increasingly expect legal information and advice to be embedded in other information and advice relevant to particular "episodes" in their lives or business dealings<sup>9</sup>. Lawyers are the only people who see legal issues as "separate". Our training teaches us to spot the "legal issues", break them off and analyse them separately. Anything that is not a "legal issue" is regarded as someone else's business. Yet clearly problems do not really come in labelled boxes, and issues must be examined in their context.

New career paths for lawyers would develop. An accounting or consulting firm would provide a new environment for lawyers to work in. Employment in such firms could be a popular option in South Australia, where in-house corporate positions have rapidly diminished, leaving law firms and the government as the main employers. It would allow lawyers with multiple qualifications and broader experience to use them more effectively. The profession as a whole would benefit from the new experience gained as lawyers move around. Law firms could learn a lot from the way in which large accounting and consulting firms develop methodologies and preserve and share their intellectual property.

Importantly, the scope offered by multi-disciplinary practice provides a way for local firms to compete locally and even nationally, on their own terms rather than on price, by expanding the pie, rather than fighting over the scraps.

## **2. Developing new and innovative services**

With each passing year, each of us has more experience, and is, theoretically, more expensive. In ten years' time, will there be enough "senior" work in South Australia to occupy all the senior lawyers? Will you have gained ten years' experience, or one year's experience ten times over? Will someone cheaper be able to do your job? A junior lawyer, a paralegal or even a computer?

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<sup>8</sup> Susskind, *The Future of Law* 1996 Oxford University Press, p.24

<sup>9</sup> Susskind, 2000 pp.72-74, 116

Clearly, we must all work on developing our future capabilities. We must avoid falling into the trap of what David Maister calls “cruising”; living off your existing skills. Some people would argue that sticking to the one thing you know amounts to “focus”, but, as Maister says, if all you work on is what you already know how to do, you’ll eventually be overtaken by someone younger who will learn how to do what you do, and will probably be willing to do it for less than you get paid.<sup>10</sup>

The same goes for the firm as a whole. Of course, today’s bills need to be paid, but firms need to take on some less familiar and challenging work which will help to develop the firm’s future capabilities and stay competitive. According to Maister, legal work can be either asset-milking (taking advantage of and exploiting existing skills, relationships, and reputation) or asset-building (offering the opportunity to develop new skills by working on frontier innovative projects, building new and stronger client relationships that will pay dividends in future years, and creating a reputation in new fields or market segments).<sup>11</sup>

Tom Peters talks in terms of “portfolio quality”; how many of your projects are challenging, will take you in new directions and will make a big difference to the client?<sup>12</sup>

### **Examples of innovative services being offered now**

An Internet search reveals that the following innovative services are currently being offered by interstate law firms or their consulting branches:

#### **Computer-based services**

- On-line self-administered training legal compliance training programs, which “sharpen the ability of executives to spot situations when a lawyer should be called in”
- an interactive program “to ensure that entry into and administration of contracts meet best practice standards, and to anticipate and address problem issues in advance”
- an on-line document collection centre for property and corporate transactions
- a virtual deal-room which “allows lawyers, clients and bidder teams to collaborate on deals, with due diligence support capabilities”
- a “virtual lawyer” service, which provides answers to clients’ questions twenty four hours a day
- gaming monitoring and reporting systems
- payroll and rostering systems
- database management services.

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<sup>10</sup> Maister, *True Professionalism* 1997 Touchstone p.39

<sup>11</sup> Maister 1997 p.188

<sup>12</sup> Peters, *The Circle of Innovation* 1997 Excel California p.208

### **Other multi-disciplinary services**

- feasibility studies
- financial analysis and modelling, eg to assess the impact of proposed projects and funding methods
- finance negotiations
- fraud investigations
- insolvency administrations
- patent attorney services
- project management, e.g. in competitive tendering and contracting and tender evaluation
- consulting in workplace relations and human resources planning
- salary surveys and salary packaging
- environment and waste management
- marketing, advertising, public relations and communications
- executive coaching and mentoring
- change management consulting
- strategic advice and development
- advice on dealing with potential business partners and local authorities in Asia

On-line services in particular (which often have the character of “products”) have the potential to be “disruptive”. This means that rather than simply supporting existing services, they may change the way clients in which get their legal advice, possibly bypassing the practitioner altogether<sup>13</sup>. Richard Susskind believes that accounting firms may lead the way in the development of on-line services, both through commoditizing existing legal work and through tapping “the latent legal market”, i.e. creating new opportunities to provide advice<sup>14</sup>.

Ideas for new services will spring from two main sources:

- evaluation of a firm’s core competencies and
- examination of client needs.

Developing ideas for new services requires some special skills and environmental conditions.

### **How do new ideas develop?**

Ideas are fragile things. If you step on one, you’ll kill it. Ideas germinate when the mind is relaxed, but are stunted by stress. Ideas need fertile conditions to grow; they won’t thrive in a judgmental climate. New ideas don’t present themselves fully formed and commercialised; they develop with experimentation, trial and error.

Law firms do not usually provide an environment in which new ideas can thrive and grow. On the contrary, stress is endemic, risk is discouraged and failure is not well tolerated. Lawyers are trained to object, refute and win the argument, but this approach is not conducive to the development of new ideas.

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<sup>13</sup> Susskind 2000 pp 58-59

<sup>14</sup> Susskind 2000 p. 62

Idea generation requires something more like what Edward de Bono describes as “parallel thinking”<sup>15</sup>, where ideas are alongside each other without clash or dispute so that a genuine exploration of an issue can take place.

How much time do you spend just tossing ideas around? How often do you share your failures and talk about why things didn’t work? No one will take this sort of risk where trust is lacking.

How often do you think and talk about things you have learned? Not just about the law, but about a client, or about the firm’s capabilities? New services will arise out of a firm’s core competencies, not just its fields of practice. What is the firm really good at? What has the firm learned from one assignment that could be offered to another client, or formally packaged as a service or product? Could the new skill be transferred to another context by analogy?

How often do you think and talk about what you don’t know? How often do you wonder about things? This suggestion is not as crazy as it may sound. The medical school at the University of Arizona has a resident philosopher whose job it is to encourage students to wonder about things, be curious and identify what they *don’t* know. Tapping their ignorance leads to hypotheses for new medical research. She maintains that “ignorance is a vast and fertile terrain for idea generation”.<sup>16</sup>

Developing new services should be a response to client needs, but clients cannot always articulate what they need or want. We need to move beyond problem solving to needs-identification. How do you identify new needs? By asking the client questions. How do you come up with those questions? By working out what you don’t know. As lawyers we tend to ignore the unknown. Instead we tend to pronounce what we do know, keep on telling the clients, and conceal our ignorance at all costs.

### **Legal R&D?**

Research and development is more often associated with pharmaceutical companies than law firms. Yet ideas have to be developed before they can be used. Research and development is the process of experimentation needed to develop ideas into fully formed proposals.

Research and development is a hard bullet to bite, because it looks like fee-spending rather than fee-earning. It also requires a change to the “eat what you kill” culture that often exists in law firms.<sup>17</sup> What’s worse, some of the experiments won’t work, giving the impression of wasted time. Tom Peters makes the point that with research and development, it is impossible to “do it right the first time”.<sup>18</sup>

The ability to develop new services is a competency in itself.

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<sup>15</sup> de Bono, *Parallel Thinking* 1993 Penguin Group, pp 36-37

<sup>16</sup> Ann Kerwin, Tucson Arizona

<sup>17</sup> Susskind 2000 p.64

<sup>18</sup> Peters 1997 p.67

### 3. Recognising alternative types of “successful lawyer”.

Reward in legal practice has always been greatest for “rainmakers”. Twenty years ago bringing in clients was mainly the province of capital partners, and lawyers who attracted clients quickly became capital partners.

Today most practitioners are expected to bring in work, not to win equity partnership, but simply to have a job. The emphasis in law firm marketing has been on individual business development rather than pooling talent; building a “team of champions”, rather than a “champion team”. Law can be a very solitary sport if everyone in the firm behaves like a sole practitioner.

Senior lawyers (those with more than five years’ experience) are expected to bring clients with them when they move to a new job. This requirement can be difficult for many lawyers to meet, for example if they are:

- Moving back from interstate or overseas
- Moving from the public sector
- Occupied with family commitments.

The decision to employ a lawyer (other than the most junior) has become a purely financial equation; what income stream will this person bring to the firm? There is a great demand for juniors because of their cheaper price, but we are experiencing a shortage of experienced juniors. “Talent” has become synonymous with having a personal coterie of clients. Yet if individual lawyers “own” the clients, the firm is very vulnerable to the salary demands of those individuals and to “poaching” by other firms.

Clearly, salaries and other bills must be paid from somewhere. But by applying the income test alone firms miss out on talent of other kinds. For example, a lawyer may not have clients to bring, but may be excellent at mentoring and training junior lawyers, or may have a talent for coordinating teamwork, or nurturing existing clients, or developing ideas for new services. A group can accomplish much more than each individual alone. Too much dependence on individual efforts limits the potential of the firm. Team work is what builds the firm’s brand and goodwill. As Maister puts it:

“A firm that can supplement the skills of individual professionals by bringing to bear its collective experience regarding each individual client problem is going to be more valuable in the marketplace than otherwise. It therefore behoves every firm to ensure that there is *value in the firm itself*.”<sup>19</sup>

With the large number of senior lawyers we are likely to have in the future, the profession would be wise to harness their experience, skills and talents, rather than squandering those resources. Unlike modelling or pop singing, law is something you can still do when you’re old. It is, or should be, a career for all seasons.

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<sup>19</sup> Maister 1997 p.98-99